PJS:GMT:mlh

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ALPHONSO THOMAS,	**:**	**No. 1: 14-CV-02316**
Plaintiff	**:**	
	:	
v.	**:**	**(Rambo, J.)**
	:	
UNITED STATES,	**:**	
Defendant	**:**	**Filed Electronically**

DEFENDANT'S REPLY BRIEF TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

NOW COMES Defendant United States of America, by and through its counsel, and respectfully submits this reply brief in support of their motion to dismiss.

I. REVELANT PROCEDURAL HISTORY

On April 29, 2016, Defendant filed its motion to dismiss. (Doc. 50.) On May 13, 2016, Defendant filed its brief in support of its motion to dismiss. (Doc. 51.) On June 2, 2016, Thomas filed a brief in opposition to Defendant's motion to dismiss. (Doc. 52.) In his opposing brief, Thomas contends that because this court has "exclusive jurisdiction" over his FTCA claims, "a certificate of merit [("COM")] is not required. (Doc. 52 at 6-7.) Thomas further claims that the purported certificate of merit, which he filed on March 2, 2016 (Doc. 44), is "legally sufficient." (Doc. 52 at 7.)

II. REPLY ARGUMENT

Defendants have filed a fully briefed dispositive motion arguing that they are entitled to dismissal because Thomas failed to file a certificate of merit as required by Pennsylvania law. As outlined more fully in its initial brief, Defendant is entitled to dismissal. For the reasons set forth below, Thomas' response to the Defendant's dispositive motion is misplaced, and, as a result, Defendant's motion to dismiss should be granted.

1. **A certificate of merit is required to prosecute the claims raised in Thomas' Amended Complaint.**

A. Thomas' Purported Certificate of Merit is Insufficient

In his opposing brief, Thomas attempts to correlate the matters in Liggon-Redding v. Estate of Sugarman, 659 F.3d 258 (3d Cir. 2011), and the idea of exclusive jurisdiction versus diversity, to his case. (Doc. 52.) Thomas appears to believe that "because this Court has exclusive, not diversity jurisdiction over such claims [his FTCA claims] against the United States, and [*sic*] expert testimony by an appropriate medical professional is unnecessary for prosecution of [his] tort claims." (Doc. 44; Doc. 52 at 6-7.) The requirements of a certificate of merit as set forth under Pennsylvania Rule 1042.3(a) are not burdened by whether or not a court has exclusive jurisdiction or diversity jurisdiction. Pennsylvania Rule 1042.3(a). Thus, Thomas' understanding of Liggon-Redding, and his attempt to correlate that decision to the matters in his case, are mistaken and misplaced.

Defendant outlined in its initial brief that because the FTCA requires a court to apply the tort laws of the state in which the alleged tort arose, and in this case the alleged tort of medical malpractice occurred in Pennsylvania, Pennsylvania's law applies. Gould Elec. Inc. v. United States, 220 F.3d 169, 179 (3d Cir.2000). Pennsylvania law requires a plaintiff alleging medical malpractice to file a Certificate of Merit. The following elements are required for a certificate of merit to be sufficient: the certificate must attest either that an appropriate licensed professional supplied a written statement that there exists a reasonable probability that the care provided fell outside acceptable professional standards, or that expert testimony of an appropriate licensed professional is unnecessary. Pa. R. Civ. P. 1042.3(a)(1) & (3). This requirement is a substantive rule and applies with full force to an FTCA action. Smith v. United States, 498 Fed. App'x 120, 121-22 (3d Cir. 2012). The purported certificate of merit, filed by Thomas on March 2, 2016 (Doc. 44), clearly fails as a matter of law. As a result, the Court should dismiss Thomas' medical malpractice claim against the United States. Smith, supra. 498 F. App'x. at 122.

B. Thomas' Claims Sound In Medical Negligence

"When a plaintiff's medical malpractice claim sounds in negligence, the elements of the plaintiff's case are the same as those in ordinary negligence actions." Grossman v. Barke, 868 A.2d 561 (Pa. Super 2005). Two characteristics define the assessment of medical malpractice claims: 1) medical malpractice can only occur where a professional relationship is established and 2) medical malpractice claims necessarily raise questions of medical judgment. (Id.) According to Thomas' Amended Complaint, a professional relationship was established between Thomas, and the medical and dental staff at FCI Schuylkill. (Amend. Compl., Doc. 41 at 1.) In addition, Thomas' Amended Complaint unquestionably raises the question of medical judgment towards the medical and dental services that he was provided. Thus, this Amended Complaint is one of medical negligence.

This Court has recognized that "as a general rule, a plaintiff has the burden of presenting expert opinions that the alleged act or omission of the defendant physician or hospital personnel fell below the appropriate standard of care in the community, and that the negligent conduct caused the injuries for which recovery is sought." Simpson v. Bureau of Prisons, 2005 WL 2387631, at *5 (M.D. Pa. 2005) (citing Grossman v. Barke, supra.) As the Pennsylvania Supreme Court observed in Toogood v. Rogal, 824 A.2d 1140, 1145 (Pa. 2003), expert testimony is necessary "[b]ecause the negligence of a physician encompasses matters not within the ordinary knowledge and experience of laypersons." The only exception to this requirement is when a matter "is so simple or the lack of skill or care is so obvious as to be within the range of experience and comprehension of even non-professional persons." Hightower-Warren v. Silk, 698 A.2d 52, 54 n.1 (Pa. 1997)(citation omitted).

Because it is clear that Thomas is arguing the adequacy of the medical and dental treatment that he received, an underlying factor in this matter involves the question of medical judgment. Grossman v. Barke, supra. Thus, Thomas is required to produce a certificate of merit for his medical malpractice claim. Smith v. United States, 498 F. App'x. 120, 121-122 (3d. Cir. 2012).

To the extent that Thomas is claiming ordinary negligence versus medical malpractice, hence his claim that expert testimony is unnecessary to prosecute his claims, this claim should be dismissed. In his Amended Complaint, Thomas complains that Defendant was negligent in providing adequate medical and dental treatment (Doc. 41 at 1), as is evident in the following statements he makes regarding the sufficiency of his treatment:

- "…federal prison employees failed to provide **adequate** medical and dental care for his [Thomas'] Trigeminal Neuralgia condition and his diagnosed tooth decay." (Amend. Compl., Doc. 41 at 1.) (emphasis added).

- "Defendant's negligence has denied Thomas an orderly and efficient system for delivering **adequate** medical services." (Amend. Compl., Doc. 41 at 12 ¶78.) (emphasis added).

- "Thomas has suffered actual damage of significant pain and suffering which is a result of – Defendant's negligence in providing **adequate** medical services." (Amend. Compl., Doc. 41 at 12 ¶79.) (emphasis added).

Further, Thomas specifies in his Amended Complaint that he is arguing "medical and dental malpractice" claims under the FTCA. (Amend. Compl., Doc. 41 at 1 ¶1.) It is clear that his Amended Complaint sounds in medical negligence. (Id.) As outlined above, and in Defendant's initial brief in support of its dispositive motion, it is clear that Thomas' claims are not that of ordinary negligence, thus he is required as per Pennsylvania law to file a certificate of merit. Pa. R. Civ. P. 1042.3(a).

III. CONCLUSION

Because Thomas is required to file a certificate of merit as required by Pennsylvania law – and to date, he has failed to do so – Defendant's motion to dismiss should be granted.

Respectfully submitted,

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s/ Michael Thiel

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Date: June 16, 2016

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CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion as to be competent to serve papers. That on June 16, 2016 she served a copy of the attached

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by placing said copy in a postpaid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Williamsport, Pennsylvania.

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s/ Anice F. Ostrom
ANICE F. OSTROM, Contractor
Forfeiture Support Associates
Data Analyst Legal Assistant